

# **HB49: The Repeal of SB91**

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*(A note from Senator Hughes) This is an important and very interesting article summarizing the process and changes in law that represent a major shift in policy to address public safety in our state. In 2016, Alaska took the most extreme steps of any state in its "Criminal Justice Reform" efforts when SB91 was signed into law. The experiment failed miserably. Crime skyrocketed. Alaska was ranked last year as the most dangerous state in the nation. The passage of HB49 is step one in the process of reversing the crime trend and restoring a sense of safety and security among Alaskans. Filling vacant trooper and prosecutor positions will be key to completion of this first step. Step two is forthcoming and will involve concentrated efforts to combat the drug epidemic and to reduce recidivism, including effective treatment and deliberative rehabilitation, education, and work training inside and outside the correctional institutions.*

## **THE PROCESS**

Senator Hughes and her colleagues in the Senate made repealing and replacing [SB91](#) a top priority for the 31st Legislature. The Governor introduced a suite of bills ([SB32](#), [SB33](#), and [SB34](#)) for that very purpose, along with a fourth bill to toughen several provisions of our sexual crime statutes ([SB35](#)). The Senate Judiciary Committee vetted and worked to improve the bills the entire session, with members combing through the details right up through the last few days as these bills were incorporated into the final SB91-repeal-replace-legislation: [HB49](#).

As Judiciary Chair, Senator Hughes explained why this was so important: "We poured over every aspect of the bills and made numerous improvements to them, to return the needed tools to law enforcement, prosecutors, and judges to ensure offenders will be held accountable for their crimes and victims will receive justice. We took our time to get it right, vetting the bills very thoroughly to repeal and replace SB91. After the fiasco of the 2016 supposed criminal justice reform and the tragic rise in crime and decline in public safety, Alaskans deserved nothing less."

Many are unaware that the work on the criminal statutes went beyond repealing and replacing SB91. A number of provisions were added that were unrelated to SB91 statute changes, such as adding additional jail time when illegal drug production or deals are conducted near children, expanding the crime of terroristic threatening to account for both real and false threats of harm, and doubling the required jail time for murderers before parole consideration.

In addition, Senator Hughes, with tremendous help from committee members (Senators Micciche, Reinbold, Shower, and Kiehl), added numerous provisions beyond SB91 in the areas of justice for sexual crime victims - an area of criminal law that had not been addressed in recent years.

Chair Hughes stated, "As we were presented the horrifying sexual crime statistics in committee at the beginning of the session, and we came face to face with the realization that Alaska is the worst state in the nation in the area of sexual crimes - and that our laws were far too lenient - this became one of the most important areas of focus for my committee and staff."

She added, "I later learned that this particular work by our committee and the inclusion of all the sexual crime provisions from SB35 into HB49 were very significant in garnering the needed support among House Majority members for HB49's final passage. I am thankful for Rep. Geran Tarr and others who recognized that our statutes were archaic in this area and needed major revisions."

After the work of the Senate Judiciary and State Affairs Committees on SB32, SB33, SB34, and SB35, at the end of May, the House sent over a last-minute, quickly assembled omnibus package, [HB49](#). It incorporated only some of the Governor's proposed changes from the four bills and did not include any of the Senate's improvements. According to Senator Hughes, "It was not well vetted, and it left far too much out and watered down key components."

The Senate considered the bill and replaced it with a version that incorporated the language from the Senate's work on SB32, SB33, SB34, and SB35. The Senate version of HB49 passed the Senate unanimously, but the House did not concur with the changes the Senate had made. A conference committee was then formed to negotiate changes to the legislation upon which both the Senate and House could agree. Senator Hughes chaired the HB49 Conference Committee with Representative Claman.

As the Judiciary Committee Aide, I assisted Senator Hughes as she held firmly to the key provisions in the Senate version. The process was intense, and she was a tough negotiator.

The House had been split, with 18 favoring the Senate version and 22 favoring the House version. The Senate, on the other hand, was 20 to 0 in favor of the Senate version. In addition, the public favored the Senate version as did the governor. With this strong backing, along with that of Senators Shower and Wielechowski who were also on the HB49 Conference Committee, Senator Hughes was successful in preserving all the vital elements to repeal and replace SB91.

In her remarks in the HB49 Conference Committee, Senator Hughes gave particular thanks to Alaskans for pressing legislators to take action regarding crime and to repeal SB91.

Last week, the House adopted and approved the HB49 Conference Committee Report 36-2 (only Representatives Wool and Hopkins voted against) and yesterday the Senate unanimously voted to approve the report. The crime legislation repealing/replacing SB91 has passed the legislature and awaits Gov. Dunleavy's signature!

### **HB49: Repeal & Replacement of SB 91** **What Does HB49 Do?**



### **FOUR KEY HIGHLIGHTS**

This overview begins with a sampling of four key highlights: 1) elimination of sentence caps for technical violations for probation/parole; 2) drug possession reclassifications; 3) returning pretrial

violations of conditions of release crimes; and 4) changes to felony presumptive sentence ranges. These highlights will then be followed by a summary of other changes under four categories: 1) Crimes: Classifications - Sentencing; 2) Probation/Parole Provisions; 3) Pretrial Provisions; and 4) Sexual Criminal Statute Changes.

Under HB49, sanctions for technical violations of probation/parole are no longer capped at 3, 5, and 10 days for first, second, and third violations as they were capped under SB91. The sanction instead will be determined by the judge or the parole board. This provision was in the Senate version and is contained in the Conference Committee Report.

Drug possession (misconduct involving a controlled substance) classifications specified in the Senate version were preserved. They are changed from offenses without jail time (in current law due to SB91) to crimes with jail time which translates to offenses for which a person will be arrested. The first offense is a Misdemeanor with a sentencing range of up to 1 year in jail. Second offenses within 10 years are C felonies.

The bill changes the punishment for violating conditions of release while awaiting trial from a maximum 5 day jail sentence (current law after SB91 was revised – was a non-jailable ticket under SB 91) to a crime carrying a maximum of 90 days or 1 year in jail. If charged with a felony and the person violates his/her conditions of release, the charge will be a Class A Misdemeanor; if charged with a misdemeanor and the person violates his/her conditions of release, the charge will be a Class B Misdemeanor. This provision from the Senate version is retained in the Conference Committee Report.

Changes to presumptive sentencing ranges\* are below. Note that all ranges were increased from current law. All nine of the Senate's presumptive ranges stay the same except first time A and second time B felonies are bumped up from current law by one year instead of two. The focus of these changes is to ensure stronger penalties for more serious crimes and for repeat offenders.

Changes to Presumptive Sentencing Ranges		SB91	HB49
<b>CLASS A FELONY</b>	1st offense	3-6 years	4-7 years
	2nd offense	8-12 years	10-14 years
	3rd offense	13-20 years	15-20 years
<b>CLASS B FELONY</b>	1st offense	0-2 years	1-3 years
	2nd offense	2-5 years	3-7 years
	3rd offense	4-10 years	6-10 years
<b>CLASS C FELONY</b>	1st offense	0-2 years	0-2 years
	2nd offense	1-4 years	2-4 years
	3rd offense	2-5 years	3-5 years

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	2nd offense	2-5 years	4-7 years
	3rd offense	4-10 years	6-10 years
<b>CLASS C FELONY</b>	1st offense	0-2 years	0-2 years
	2nd offense	1-4 years	2-4 years
	3rd offense	2-5 years	3-5 years

*\*Certain sexual crimes and crimes against a person are unclassified felonies with harsher sentencing guidelines.*

## **CRIMES: CLASSIFICATIONS - SENTENCING**

In addition to the felony range changes above, Class B Misdemeanors will now be sentenced to up to 90 days jail time rather than the 30-day limit in current law. This was a provision in the Senate version that was preserved. Judges will again have discretion to sentence Class A Misdemeanors up to 365 days for all A misdemeanors (SB91 had a cap of 30-days for many offenses).

HB49 removes all automatic inflation adjustments imposed in SB91. These adjustments are related to dollar values for property crimes that separate misdemeanor and felony conduct. (Included in both Senate and House versions.)

HB49 allows the amounts stolen by a defendant within a 6-month period to be aggregated in order to hold serial thieves accountable with stiffer penalties. (Included in both versions.)

HB 49 establishes a new crime to combat motor vehicle thefts: possession of motor vehicle theft tools. The crime requires that a person has an intent to steal a vehicle or the contents of the vehicle. (Included in both versions.)

HB49 creates new and harsher penalties for identity theft. The classifications range from A Misdemeanor to B Felony depending on the dollar amount involved. (Included in both versions.)

All Driving with License Suspended, Revoked, and Cancelled (DWLS, DWLR, and DWLC) are crimes will be a crime under the new law. The Senate version imposed the stiffer penalties. HB49 will also allow the administrative cancellation of a person's driver's license if they have over \$1,000 in outstanding traffic fines.

The 24-hour sentence limit for disorderly conduct was changed under HB49: 1st time

disorderly conduct will now be 0-3 days; all others will be 0-10 days. The Senate version included the increased term.

HB49 adds the crime of making real terroristic threats to the crime of making false threats. Both are a class C felony. (Included in both versions.)

The bill adds removing, disabling, or tampering with an electronic monitoring device as a C Felony under the escape statutes. (Included in both versions.)

An improvement to the 'truth in sentencing' laws from the Senate version was retained. It instructs judges, at the time of sentencing, to give an oral report regarding the length of the sentence, including when the offender may be eligible for mandatory parole and when they may be eligible for discretionary parole. Currently this is only required in a written report that few see. This provision will help ensure the victim and the public - including the media - have more accurate information as to the expected length of the jail term and when the offender could be back on the street.

### **PROBATION / PAROLE PROVISIONS**

Under current law, most offenders are eligible for discretionary parole after serving 1/4 of their sentence. The new law states that certain offenders must serve 1/2 of their sentence before becoming eligible for discretionary parole. Again, this provision was from the Senate version.

Those convicted of Murder I or Murder II will not be eligible for mandatory parole nor for good time credit. These offenders will be eligible for discretionary parole after serving the mandatory minimum or 2/3 of their sentence, whichever is greater. This effectively doubles the amount of time they must serve before becoming eligible for mandatory parole (from the Senate version).

HB49 returns to pre-SB91 restrictions on what crimes are eligible for discretionary parole. The bill makes the following crimes ineligible: Non-sex class A felonies (Robbery 1, Assault 1, Arson 1, Escape 1, MIW 1); B felonies if the person had one or more prior felony convictions; C felonies if the person had two or more prior felony convictions; and B and C sex felonies (Sexual Assault 2, Sexual Abuse of a Minor 2, Distribution of Child Pornography).

Individuals convicted of B felony level drug distribution will not be eligible for discretionary parole until serving one-half of the active term of imprisonment under HB49. Under current law, those offenders are eligible after serving one-fourth of the active term of imprisonment.

The bill adjusts how parole time is tolled. A parolee's parole time will not continue to run while the parole violation is under consideration by the parole board.

HB49 excludes from eligibility to earn compliance credits parolees who are on parole for felony crimes against a person, sex offense, unclassified felonies or for crimes involving domestic violence.

Application for discretionary parole hearings will no longer be automatic for offenders (Senate version), except for 'model inmates' eligible for parole who have had no infractions during incarceration (House version).

Earned compliance credit for good conduct on probation and parole is reduced to 10 days (earned) for every 30 days (served). Under SB91 it was 30 days (earned) for every 30 days (served). (Included in both versions.)

The maximum length of probation for sex felonies is increased from 15 to 25 years and to 10 years for other offenses.

## **PRETRIAL PROVISIONS**

HB49 allows a person's rap sheet to be used at grand jury to prove the existence of prior convictions when prior convictions are an element of the offense.

Under SB91, a 30-day grace period was granted for failure to appear in court. HB49 eliminates this grace period.

HB49 reduces the burden of proof from "clear and convincing evidence" to the pre-SB 91 standard of preponderance of the evidence for imposing release conditions pre-trial. A judge will no longer be bound by the score on the pre-trial risk assessment tool but will have full discretion to impose the appropriate release conditions – including bail. HB49 strips the pretrial assessment tool of its power and decision-making authority. Instead of being the deciding factor in determining whether a suspect will be released on bail awaiting trial, the tool will be one of a dozen items the judge reviews if it is available. The tool is not assigned any weight or value in this consideration process; judges will have full discretion as they did prior to SB91.

Private sector entities and third-party custodians will again be options even in communities where Department of Corrections (DOC) has pretrial services. The Senate version toughened the requirements for third party custodians to prevent recent felons from supervising persons charged with crimes. DOC will have the flexibility to provide pretrial supervision under its probation/parole program (the current administration has indicated this preference).

Defendants will no longer be eligible to receive credit for time served for pre-trial electronic monitoring for certain offenses.

Pretrial credit for substance abuse treatment is no longer unlimited but is capped at 365 days.

The mandatory electronic monitoring or house arrest for first time DUI is eliminated under current law and HB49 returns the discretion to the Department of Corrections.

## **SEXUAL CRIMINAL STATUTE CHANGES**

Sexual Assault in the Second and Third Degree - HB 49 changes the required mental state from "knowing" to "reckless" as to the circumstance when the offender engages in penetration (sexual assault in the second degree) and sexual contact (sexual assault in the third degree) with a victim who is mentally incapable, incapacitated, or unaware that the sexual act is being committed.

Sexual Abuse of a Minor Sentencing - HB49 makes sexual abuse of a minor in the third degree a sexual felony when there is a 6 year age difference, thus increasing the sentencing range from 0-2

to 2-12 years.

**Indecent Exposure - HB49** makes indecent exposure when the offender masturbates in the presence of an adult a class C felony and a class B felony if the offender masturbates in the presence of a person under 16 years of age.

**Unlawful Exploitation of a Minor - HB49** makes unlawful exploitation of a minor an unclassified felony if the person has been previously convicted of exploitation of a minor or the victim is under 13 years of age. This crime entails involving a child in lewd sexual acts, such as for the filming and production of child pornography. Unlawful exploitation of a minor is currently a class B felony upon the first conviction and a class A felony if the person has been previously convicted. Under HB49, child pornographers and those involved with child porn sharing services will be faced with harsher sentences.

**Presumptive Sex Offense Sentencing - Clarifies** under HB49 that any prior felony counts as a prior felony for presumptive sentencing purposes in sex cases. This means prior felonies, even when they are a non-sex felony, trigger an increased presumptive range for a sex offense.

**Presumption of No Contact - Under** the new law, the default for domestic violence and sexual assault will be a presumption of a no contact order - so the perpetrator is not to have contact with the victim. This eliminates the need for the victim to file a protective order, thus protecting the victim from retaliation by the perpetrator for filing such an order. This was a provision in the Senate version that was retained.

**Out-of-State Sex Offender Registration - HB49** requires anyone convicted of a registrable sex offense in another state to register in Alaska if they move to Alaska.

**Indecent Viewing and Production - The** new law makes indecent viewing or production of a picture of a child and production of a picture of an adult a registrable sex offense and sentenced as a sexual felony. Conduct involving the viewing of a picture of an adult would be a class A misdemeanor. HB49 thus increases penalties in cases where a hidden camera is placed in a private space.

**Soliciting Sex From A Minor - HB49** deletes “online” from the crime of “online enticement of a minor” making any solicitation of a minor for sex a B felony.

**Unwanted Images Of Genitalia - The** bill criminalizes the repeated sending of unwanted explicit images of genitalia to another person (such as repeatedly texting unwanted nude pictures to someone’s phone) as harassment in the second degree (B Misdemeanor).

**Mandatory Reporting - HB49** requires a mandatory reporter to immediately report harm to a child that is the result of a suspected sex offense to a law enforcement agency rather than only to a supervisor, school principal, etc.

**Timely Processing of Rape Kits - HB49** requires law enforcement agencies to send all sexual assault examination kits to a crime lab within 30 days of collection, that all kits collected are tested within one year, and that victims are notified within 2 weeks that testing is complete.

Victim Notification Update - HB49 adds a requirement for victim notification by the prosecutor when an offender is discharged from a treatment program for non-compliance.

Marriage Defense to Sexual Assault - HB49 removes marriage status as legal defense against a rape charge. The bill repeals marriage as a defense to sexual assault except in cases where there is consent and the conduct is illegal due to the nature of the relationship but-for the marriage (probation officer/probationer, peace officer/person in custody, DJJ officer/person 18 or 19 an under the jurisdiction of the Division of Juvenile Justice).

### **A Final Note Regarding Costs to Improve Public Safety**

Public safety is a top priority and the passage of this legislation adds costs estimated at about \$50 million per year. HB49 will require the re-opening of the Palmer Correctional Facility. This bill and the operating budget include funding for additional prosecutors and victim advocate paralegals. The legislature has provided more funding for judges and court positions. An effort is underway now to fill 40 vacant Alaska State Trooper positions and to recruit more Village Public Safety Officers.

Yes, there is a cost to improving public safety. This is a core and fundamental duty and function of our state government, however, and we must step up to the plate. As we do, we should not neglect to weigh into the equation the fact that the cost of crime to individual Alaskans exceeds the \$50 million annual price tag.

In Anchorage alone, property theft totaled \$45.3 million in 2017. Add property theft in Mat-Su, Kenai, Juneau, and other parts of the state, and the total easily shoots past the \$50 million mark. And that's just property crimes. What about violent and sexual crimes? Add to the total the cost of medical care, psychiatric appointments, attorney fees, security systems, increased insurance, and lost workdays. That's millions more.

Make no mistake, an additional \$50 million cost to the state each year is not insignificant. But when individual Alaskans are bearing the brunt of even more than \$50 million per year and doing so in fear and danger, the expense to the state to improve public safety is one we shouldn't spare.